

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs January 30, 2007

STATE OF TENNESSEE v. KENNETH CLAY DAVIS

**Appeal from the Criminal Court for Sevier County
No. 10731, 11108 Rex Henry Ogle, Judge**

No. E2006-01459-CCA-R3-CD - Filed April 30, 2007

The Appellant, Kenneth Clay Davis, was indicted for identity theft and violation of the habitual motor vehicle offender act. The Appellant was convicted by a jury on both counts and received an effective twelve-year sentence as a career offender. After the denial of a motion for new trial, the Appellant initiated this appeal. On appeal, the following issues are presented for our review: (1) whether the evidence was sufficient to support the Appellant's convictions; and (2) whether the State had a duty to preserve a video tape of the Appellant's traffic stop when the tape was defective and failed to record the stop. Because we determine that there was sufficient evidence to support the Appellant's convictions and that the State had no duty to preserve evidence that did not exist, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and J. CURWOOD WITT, JR., J., joined.

Micaela Burnham, Sevierville, Tennessee, for the appellant Kenneth Clay Davis.

Robert E. Cooper, Jr., Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; Al Schmutzer, Jr., District Attorney General and Johnnie D. Sellars, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The Appellant was indicted by the Sevier County Grand Jury in May of 2005 for identity theft and driving after being declared a habitual motor vehicle offender (HMVO).

At trial, the jury heard the testimonies of Officer James Roberts of the Sevierville Police Department and the Appellant. According to Officer Roberts, on March 22, 2005, he stopped a vehicle for driving sixty-two miles per hour in a thirty-five mile per hour zone. Officer Roberts

identified the Appellant as the driver of the vehicle. When Officer Roberts approached the vehicle, the Appellant identified himself as Mitchell L. Davis. Even though the Appellant was unable to produce a driver's license, he provided Officer Roberts with a social security number as identification. The Appellant did not appear to be under the influence of alcohol or drugs.

Officer Roberts testified that the car also held a female passenger in the front seat and a male passenger in the back seat. Officer Roberts stated that Mitchell Davis's driver's license was revoked, but that he decided to issue the Appellant a misdemeanor citation and release him.

Sometime later that morning, Officer Roberts responded to a call about an incident at the Wal-Mart in Sevierville involving the Appellant. When Officer Roberts arrived on the scene, he learned that the Appellant, who had previously identified himself as Mitchell Davis, was really Kenneth C. Davis. A check of the Appellant's driver's license number revealed that the Appellant was an habitual motor vehicle offender. Officer Roberts also discovered that Mitchell Davis was the Appellant's brother and that his social security number was one digit different from the Appellant's. When Officer Roberts observed the Appellant at Wal-Mart, he appeared to be under the influence of drugs.

Officer Roberts explained that when the blue lights on his patrol car are activated, an onboard video camera begins recording. When Officer Roberts was preparing to testify in front of the grand jury, he discovered that the video tape or video camera used during the Appellant's stop for speeding malfunctioned and that there was nothing on the tape. Officer Roberts attempted to watch the tape on two different VCRs, but there was nothing on the tape.

The Appellant testified in his own defense at trial. According to the Appellant, Officer Roberts did not stop him for speeding, rather he and two other people were in the car and were already stopped in a parking lot at the Co-op when Officer Roberts approached the car and addressed him as "Mitchell." The Appellant stated that the officer asked him for his social security number and birth date. The Appellant claimed that he told the officer that he was illiterate and did not know his social security number. The Appellant also claimed that he was sitting on the passenger side of the vehicle and never saw the officer activate his blue lights. The Appellant admitted that he was an habitual motor vehicle offender.

At the conclusion of the trial, the jury found the Appellant guilty of identity theft and driving after having been declared an habitual motor vehicle offender. After a sentencing hearing, the trial court sentenced the Appellant to twelve years as a career offender for identity theft and six years as a career offender for driving in violation of the habitual motor vehicle offender act. The trial court ordered the sentences to run concurrently, for a total effective sentence of twelve years. The Appellant filed a timely notice of appeal after the denial of a motion for new trial.

Analysis Sufficiency of the Evidence

On appeal, the Appellant argues that the evidence was insufficient to support his convictions for identity theft and violation of the habitual motor vehicle offender act. Specifically, the Appellant argues that Officer Roberts' testimony was so lacking and his testimony so full of "serious inconsistencies" that they should "negate that testimony given its importance in convicting the [Appellant]." The State disagrees, contending that the evidence was sufficient to sustain the convictions.

When a defendant challenges the sufficiency of the evidence, this Court is obliged to review that claim according to certain well-settled principles. A verdict of guilty, rendered by a jury and "approved by the trial judge, accredits the testimony of the" State's witnesses and resolves all conflicts in the testimony in favor of the State. State v. Cazes, 875 S.W.2d 253, 259 (Tenn. 1994); State v. Harris, 839 S.W.2d 54, 75 (Tenn. 1992). Thus, although the accused is originally cloaked with a presumption of innocence, the jury verdict of guilty removes this presumption "and replaces it with one of guilt." State v. Tuggle, 639 S.W. 2d 913, 914 (Tenn. 1982). Hence, on appeal, the burden of proof rests with the defendant to demonstrate the insufficiency of the convicting evidence. Id. The relevant question the reviewing court must answer is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. See Tenn. R. App. P. 13(e); Harris, 839 S.W.2d at 75. In making this decision, we are to accord the State "the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom." See Tuggle, 639 S.W.2d at 914. As such, this Court is precluded from re-weighing or reconsidering the evidence when evaluating the convicting proof. State v. Morgan, 929 S.W.2d 380, 383 (Tenn. Crim. App. 1996); State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Moreover, we may not substitute our own "inferences for those drawn by the trier of fact from circumstantial evidence." Matthews, 805 S.W.2d at 779. Further, questions concerning the credibility of the witnesses and the weight and value to be given to evidence, as well as all factual issues raised by such evidence, are resolved by the trier of fact and not the appellate courts. State v. Pruett, 788 S.W.2d 559, 561 (Tenn. 1990).

The Appellant herein was convicted of identity theft and violation of the habitual motor vehicle offender law. Tennessee Code Annotated section 39-14-150(a) defines the crime of identity theft as follows: "A person commits the offense of identity theft who knowingly obtains possesses buys, or uses the personal identifying information of another." Tenn. Code Ann. § 39-14-150(b). As pertinent to the Appellant's appeal in this case, the term "personal identifying information" is also defined as "any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including: (1) Name, social security number," Tenn. Code Ann. § 39-14-150(e)(1). Additionally, an individual violates the habitual motor vehicle offender act by operating "any motor vehicle in this state while the judgment or order of the court prohibiting the operation remains in effect." Tenn. Code Ann. § 55-10-616(a).

On appeal, the Appellant does not argue that the elements of identity theft were not established beyond a reasonable doubt. Instead, the Appellant argues that Officer Roberts' had to refresh his memory with his notes during cross-examination. Viewing the evidence in a light most favorable to the State, the evidence shows that the Appellant was driving a vehicle that was stopped

for speeding. When Officer Roberts approached the Appellant, he identified himself as Mitchell Davis and gave the officer Mitchell Davis's social security number for identification purposes. Officer Roberts released the Appellant with a citation. Sometime later, Officer Roberts responded to a call at Wal-Mart that involved the Appellant. At this time, Officer Roberts discovered that the Appellant was not Mitchell Davis. At that time, Officer Roberts arrested the Appellant for violating the habitual motor vehicle offender act and identity theft. The Appellant admitted that he was a habitual motor vehicle offender. Although the Appellant gave a different version of the events at trial, the jury was within its discretion to accredit Officer Roberts's version of the events. The evidence was sufficient to support the convictions for identity theft and violation of the habitual motor vehicle offender act. This issue is without merit.

Videotape of the Traffic Stop

Next, the Appellant contends that he was prejudiced by the loss and/or destruction of the video tape recording of the traffic stop. Specifically, the Appellant claims that the video tape qualifies as lost or destroyed evidence that could have been exculpatory under the analysis set forth in State v. Ferguson, 2 S.W.3d 912 (Tenn. 1999). The State disagrees, arguing that the Appellant was aware that the video tape of the traffic stop did not exist due to the malfunctioning of the camera and the State could not be responsible for preserving "non-existent evidence."

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides every defendant the right to a fair trial.¹ To facilitate this right, a defendant has a constitutionally protected privilege to request and obtain from the prosecution evidence that is either material to guilt or relevant to punishment. Brady v. Maryland, 373 U.S. 83, 87 (1963). Further, the prosecution has a duty to turn over exculpatory evidence that would raise a reasonable doubt about a defendant's guilt. United States v. Agurs, 427 U.S. 97, 110-11 (1976).

In the case of Ferguson, 2 S.W.3d at 916, our state supreme court adopted a test for courts to use in determining whether the loss or destruction of evidence deprived a defendant of a fair trial. The initial analytical step in this test for determining whether there was any duty to preserve evidence was described as follows:

Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

¹"As a general rule, . . . a trial lacks fundamental fairness where there are errors which call into question the reliability of the outcome." Ferguson, 2 S.W.3d at 914 n.3 (citing Betts v. Brady, 316 U.S. 455, 462 (1942); Watkins v. State, 393 S.W.2d 141, 144 (Tenn. 1965); Lofton v. State, 898 S.W.2d 246, 248 (Tenn. Crim. App. 1994)).

Id. at 917 (quoting California v. Trombetta, 467 U.S. 479, 488-89 (1984)). The Court explained that if the proof demonstrates the existence of a duty to preserve the evidence and demonstrates that the State failed in that duty, “the analysis moves to considerations of several factors which guide the decision regarding the consequences of the breach.” Id. Accordingly, those factors include: “(1) The degree of negligence involved; (2) The significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available; and (3) The sufficiency of the other evidence used at trial to support the conviction.” Id. at 917. “If, after considering all the factors, the trial judge concludes that a trial without the missing evidence would not be fundamentally fair, then the trial court may dismiss the charges.” Id. However, dismissal is but one of the trial judge’s options. Id.

In this case, unlike Ferguson, it is clear based on the testimony of Officer Roberts that the evidence that the Appellant now argues was lost or destroyed did not ever exist. Officer Roberts testified that his patrol vehicle was equipped with a video recording device and that, as far as he knew, the equipment was functioning that day. However, when he sat down to review the tape prior to the grand jury hearing, the tape was blank. Officer Roberts attempted to view the videotape on two different VCRs and testified that there was nothing on the tape. Officer Roberts testified that this is how he discovered that the recording equipment in his patrol vehicle was malfunctioning. The trial court determined that the videotape was not lost evidence because the “failure of it [the equipment] to work” is not the equivalent of the State destroying evidence. We agree. The State cannot destroy evidence that does not exist. After a review of the record, we have concluded that there is no substantial evidence showing that the State destroyed evidence. Accordingly, we believe that this issue is without merit.

Conclusion

For the foregoing reasons, the judgments of the trial court are affirmed.

JERRY L. SMITH, JUDGE